

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

B&B INVESTMENTS,

Appellant,

v.

WELLS FARGO BANK, N.A.,

Respondent.

B176345

(Los Angeles County
Super. Ct. No. LS011984)

APPEAL from an order of the Superior Court of Los Angeles County, Leon Kaplan, Judge. Affirmed.

Laurence H. Lishner for Appellant.

Mulvaney, Kahan & Barry, Tina M. Pivonka and Everett G. Barry, Jr. for Respondent.

This appeal challenges the trial court's discretion in granting relief from default based on excusable neglect, pursuant to Code of Civil Procedure section 473. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Wells Fargo Bank N.A. held a third trust deed on a parcel of real property in Los Angeles. Its interest was junior to trust deeds held by First Countrywide and Citifinancial Mortgage Company, Inc. There were numerous other security interests in the property. B&B Investments obtained title to the property in August 2003, subject to these security interests.

In September 2003, First Countrywide foreclosed on the property. The sale resulted in a surplus of \$188,762.83 after First Countrywide was paid. Wells Fargo submitted a claim to the trustee and to the trustee's counsel for \$35,295.66 of the surplus proceeds. The trustee received several other written claims for the surplus proceeds, including a claim from B&B Investments.

The trustee found there was a conflict between potential claimants, and that it was unable to determine the priority of claims. On November 21, 2003, it filed a petition and declaration regarding unresolved claims and deposit of undistributed surplus proceeds of trustee's sale. The trustee gave written notice "to all persons with a recorded interest in the property" that it intended to deposit funds from the sale with the clerk of the court, and that "A claim for funds must be filed with the court within 30 days from the date of notice." Wells Fargo received this notice, but did not file a claim with the court. B&B Investments filed an objection to the claims of all parties except Citifinancial and Household Finance.

After a hearing on February 20, 2004, the court approved the claims of Citifinancial Mortgage Company and Household Finance Corporation of California, and ordered the remaining net surplus funds paid to B&B Investments.

On March 9, 2004, Wells Fargo filed an ex parte application seeking leave to file an answer and claim to the surplus funds and for inclusion in the order distributing funds. In its moving papers, Wells Fargo explained that its employee, Theresa Bui, was charged with

monitoring the foreclosure sale and distribution of proceeds. According to Ms. Bui's declaration, based on the papers she received regarding this matter, she believed the submission of claims to the trustee and to counsel for the trustee was sufficient to protect Wells Fargo's rights with respect to the surplus funds, and did not realize that a claim also needed to be filed with the court. Ms. Bui did not refer this matter to Wells Fargo's in-house or outside counsel. Wells Fargo asserted that a claim was not required because it was a known, undisputed claimant. Alternatively, it argued that if a claim was required, the court should exercise its discretion to excuse its failure to file a claim based on mistake, inadvertence, surprise, or excusable neglect, and permit it to file a claim. B&B opposed the motion on the ground that Wells Fargo's inadvertence did not constitute excusable neglect.

The court granted the motion for relief and set a hearing to show cause why Wells Fargo's claim should not be approved. Wells Fargo stipulated to reduce its claim by \$3,000 to compensate B&B for attorney's fees, and the court approved its reduced claim. B&B appeals from the court's order.

DISCUSSION

Under Code of Civil Procedure¹ section 473, subdivision (b), "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." In *Zamora v. Clayborn Contracting Group, Inc.* (2002) 28 Cal.4th 249, 256, the Supreme Court explained that the "venerable principles" underlying section 473 require its provisions to be liberally construed, in order to further the sound policy favoring the determination of causes on their merits. "[A]ny doubts in applying section 473 must be resolved in favor of the party seeking relief. When the moving party promptly seeks relief and there is no prejudice to the opposing party, very slight evidence is required to justify relief." (*Mink v. Superior Court* (1992) 2 Cal.App.4th 1338, 1343.)

¹ All statutory references are to this code unless otherwise indicated.

In this case, Wells Fargo learned on March 4, 2004 that the last day to object to the order for distribution of proceeds was March 5. It contacted counsel late in the day on March 4, and counsel received the documentation on the morning of March 5. On March 5, counsel was informed that the proposed order had been entered on February 20. Counsel for Wells Fargo promptly sought relief, filing its ex parte application for leave to file an answer and claim just four days later, less than three weeks after the order had been entered.

There also was no prejudice to any party from the grant of relief. Wells Fargo had submitted its claim to the surplus funds to the foreclosure trustee and its counsel before this case was filed, and there was no factual dispute regarding the priority of its lien. At the time Wells Fargo sought relief, the surplus funds had not yet been distributed. B&B was not prejudiced by the grant of relief; it was merely deprived of a windfall.

We turn to the question of mistake or excusable neglect. A “mistake” justifying relief under section 473 may be either a mistake of fact or a mistake of law. (*H. D. Arnaiz, Ltd. V. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1368.) “The test of whether neglect was excusable is whether “a reasonably prudent person under the same or similar circumstances” might have made the same error. [Citations.]” (*Luri v. Greenwald* (2003) 107 Cal.App.4th 1119, 1128.) In our case, the evidence supports the trial court’s grant of relief based on both mistake and excusable neglect.

Theresa Bui was employed by Wells Fargo as a foreclosure representative, responsible for overseeing the foreclosure proceedings at issue in this case. According to her declaration, she received notice of the foreclosure sale, and notice that there were surplus proceeds from the sale. In response, she submitted notarized claims on behalf of Wells Fargo to the foreclosure trustee and to the trustee’s counsel. After that, “I began to receive papers regarding this court matter. I am not an attorney and I was under the belief that the previous submissions of the two claims . . . was sufficient to protect Wells Fargo’s rights with respect to the surplus funds. I did not receive any papers that led me to believe that there was any dispute as to Wells Fargo’s second priority position. I believed that the filing of the previous claims and fact that notices in this matter were being sent directly to my attention meant that Wells Fargo’s claim had been received and was properly before the

Court. I did not understand that any other papers must be filed in this matter. I did not refer this matter to Wells Fargo's in house counsel or outside counsel.”

Wells Fargo, through its employee, was mistaken in its belief that filing a claim with the foreclosure trustee was sufficient to protect Wells Fargo's right to the surplus proceeds. Because of this erroneous conviction, Wells Fargo failed to file a claim with the court in this action. A mistake sufficient to justify relief may be found where, as here, “a party, under some erroneous conviction, does an act he would not do but for the erroneous conviction.” (*H. D. Arnaiz, Ltd. v. County of San Joaquin, supra*, 96 Cal.App.4th 1357, 1369.)

Ms. Bui's misunderstanding as to the need to file a claim and answer with the court also supports a finding of excusable neglect. As we have explained, she had diligently filed claims with the foreclosure trustee and with the trustee's counsel, just days before this action was filed in superior court. The petition expressly acknowledged the existence of Wells Fargo's security interest, and the claim Ms. Bui submitted to the trustee and its counsel on behalf of Wells Fargo was attached to the petition as one of the conflicting claims to the surplus funds. All pleadings in this action were served on Wells Fargo, directed to the attention of Ms. Bui, from which she inferred that the claim she had submitted to the trustee on behalf of Wells Fargo had been received and was before the court. She received no pleadings or other communication indicating any dispute as to Wells Fargo's priority position or its right to surplus proceeds. This is evidence from which the court could conclude that a reasonably prudent person under similar circumstances might have made the same error, and hence that Wells Fargo's failure to file a claim was excusable neglect.

“A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.” (*State Farm Fire & Casualty Co. v. Peitak* (2001) 90 Cal.App.4th 600, 610.) On this record, we conclude the trial court did not abuse its discretion by granting relief to Wells Fargo.

B&B also argues that the 30-day claim filing period under Civil Code section 2924j, subdivision (d) operates as a statute of limitations, and that relief under section 473 is not available after the expiration of the statutory period. This argument was not presented to the

trial court, and therefore was not preserved for appeal. (See *Burden v. Snowden* (1992) 2 Cal.4th 556, 570.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

CURRY, J.

GRIMES, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.